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April 5, 2012

VIA E-MAIL

Chief Clerk of the Trial Judiciary
Military Commissions
MLAdd-OMCTrialJudiciary@osd.mil

Col. James L. Pohl
Military Judge
Military Commissions Trial Judiciary
Guantanamo Bay, Cuba

Re: Press' Objection to Closure of Proceeding in *United States of America v. Abd al Rahim Hussayn Muhammad al Nashiri*

Dear Col. Pohl:

We represent the Miami Herald, Fox News Network, The McLatchy Company, National Public Radio, New York Times, The New Yorker magazine, Reuters, Tribune Company, Wall Street Journal, and Washington Post (collectively herein "Press Objectors"), whose journalists regularly cover the military commissions at Guantanamo Bay. I am writing on their behalf, pursuant to the right of the public and the press to attend criminal proceedings granted by the First Amendment to the Constitution of the United States, and pursuant to Section A. ¶ 5 of the Media Ground Rules for Guantanamo Bay, Cuba, dated September 10, 2010 ("Media Ground Rules"), and Regulation 19-3(d) of the Department of Defense Regulation for Trial by Military Commission, to object to plans to conduct a completely closed hearing next week in *United States v. Abd al Rahim Hussayn Muhammad al Nashiri*.

Specifically, according to the Docketing Order of 21 March 2012, a hearing is set for April 11, 2012 on a Defense motion (AE26), in which the defendant seeks an order directing the Commander of JTF-GTMO to allow al Nashiri to meet with his attorneys without being shackled to the floor of the meeting room. Based on comments and court filings by al Nashiri's defense counsel, Rick Kammen, Mr. al Nashiri is expected to testify about the various enhanced interrogation techniques to which he has been subjected while a U.S. detainee. Defense counsel Kammen has also publicly stated that the portion of the hearing at which al Nashiri testifies is likely to be closed to the press and public and conducted completely in secret. *See* Carol Rosenberg, *Secrecy Likely to Surround Guantanamo Testimony of Alleged USS Cole Bomber*,

MIAMI HERALD (Mar. 27, 2012) (quoting defense attorney Rick Kammen). This hearing is expected to be closed apparently because al Nashiri's testimony is likely to discuss information that is currently classified and/or has been designated as "Protected Information" under the rules of this tribunal.

For the reasons stated below, the Press Objectors hereby object to the blanket closure of next week's hearing. Given the First Amendment standards that protect public access to the proceedings in this prosecution and the substantial public interest in the transparency of the military commissions, we respectfully submit that: (1) no proper basis exists to close testimony that addresses information that is already publicly known; and (2) the authorized procedure of allowing the press to observe the hearing behind glass with a white noise machine used to redact in real time any classified or protected information is a less restrictive alternative that should be used. Furthermore, (3) a de-classified transcript of the proceeding should be made publicly available on an expedited basis to minimize in time and scope the infringement on the public's right to follow the proceedings in this case. As grounds for this relief, the Press Objectors state as follows:

THE PUBLIC HAS A PRESUMPTIVE RIGHT OF ACCESS TO ALL COMMISSION SESSIONS, INCLUDING PRETRIAL HEARINGS

Both the Military Commissions Act ("MCA") and the Constitution of the United States recognize a qualified right of public access to the proceedings (and records) of the military commissions at Guantanamo. In adopting the Military Commissions Act in 2006, Congress recognized the critical importance that these proceedings be conducted in the open so the watching world would accept their validity. *See, e.g.*, 152 CONG. REC. H7522, H7534 (Sept. 27, 2006) (statement of Rep. Hunter); 152 CONG. REC. H7508, H7509 (Sept. 27, 2006) (statement of Rep. Cole); 152 CONG. REC. H7522, H7552 (Sept. 27, 2006) (statement of Rep. Hunter); 152 CONG. REC. H7925, H7937 (Sept. 29, 2006) (statement of Rep. Sensenbrenner); 152 CONG. REC. H7925, H7945 (Sept. 29, 2006) (statement of Rep. Sensenbrenner). Congress thus expressly mandated, in 2006 *and again in 2009*, that the commission proceedings must be open to the press and public, except in certain narrowly limited circumstances. *See* 10 U.S.C. § 949d(c)(2).

The MCA and its implementing regulations mandate a public right of access that extends to all aspects of any "proceeding" against an enemy combatant. *See* MCA § 949d(c)(2) (extending right of access broadly to all "proceedings" of the commissions). The Department of Defense Regulation for Trial by Military Commission ("Regulation" or "Reg."), the Manual for Military Commissions ("Manual" or "R.M.C."), and the Military Commissions Trial Judiciary Rules of Court ("R.C.") make plain that the proceedings are to be open to "representatives of the press, representatives of national and international organizations, . . . and certain members of both the military and civilian communities," R.M.C. 806(a), and that the "proceedings" open for public inspection include motion papers, rulings, and conference summaries that form the record.

Under the Regulation, the right of access applies "from the swearing of charges until the completion of trial and appellate proceedings or any final disposition of the case." Reg. 19-2. Under the Manual, pre-trial motions are among the "proceedings" controlled by the military judge. R.M.C. 801(a)(3); *see also* R.M.C. 908(b)(4)(A) (motions not affected by order on appeal "may be litigated, in the discretion of the military judge, at any point in the proceedings"); R.C. 2.2c ("All filings may be subject to public disclosure" and so parties must submit redacted versions "suitable for disclosure to the public"); R.C. 3.9 ("Public Release of Pleadings"). Where Congress has mandated proceedings open to the press, and permitted a limitation of access by a military judge only upon a "specific finding" that it is "necessary" to protect national security or ensure physical safety, DOD cannot impose restrictions that are inconsistent with this statutory mandate and frustrate the Congressional objectives embodied in the MCA itself. Indeed, Reg. 19-6 states that "[t]he military judge may close proceedings of military commissions to the public only upon making the findings required by M.C.A. § 949d(c) and R.M.C. 806." *See also* Reg. 18-3 (also requiring express finding, which "shall be appended to the record of trial.").

The First Amendment independently "protects the public and the press from abridgement of their rights of access to information about the operation of their government." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 584 (1980) (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-10, 513 (1984) ("*Press-Enterprise I*") (Blackmun, J. and Stevens, J., concurring) (recognizing First Amendment right of public access to *voir dire* proceedings); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) ("*Press- Enterprise II*") (Stevens, J., dissenting) (same as to preliminary hearings in a criminal prosecution). This First Amendment right of public access attaches to proceedings of adjudicative military tribunals, including military commissions.[1] It also attaches to court records in such criminal prosecutions.[2]

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[1] *See, e.g.*, *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) (absent adequate justification clearly set forth on the record, "trials in the United States military justice system are to be open to the public"); *ABC, Inc. v. Powell*, 47 M.J. 363, 366 (C.A.A.F. 1997) (First Amendment right of public access applies to investigations under Article 32); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (First Amendment right of public access extends to courts-martial); *United States v. Hershey*, 20 M.J. 433, 436, 438 & n.6 (C.M.A. 1985) (finding First Amendment right of public access to a court-martial proceeding); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (same); *United States v. Story*, 35 M.J. 677, 677 (A. Ct. Crim. App. 1992) (per curiam) (same).

[2] *See, e.g.*, *Washington Post v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991) (holding that First Amendment right of access attaches to plea agreement); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502-04 (1st Cir. 1989) (same for sealed criminal court files); *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1515-17 (9th Cir. 1988) (Reinhardt, J., concurring) (documents relating to pretrial release hearing); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (search warrant affidavits); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (plea agreement); *In re Storer Commc'ns, Inc.*, 828 F.2d 330, 336 (6th Cir. 1987) (motion to recuse judge); *In*

Consistent with this constitutional right, the Rules of Court provide that records are not sealed unless the military judge orders that they "should not be released in the interests of ensuring the parties receive a fair trial or for other reasons," R.C. 8.3, and records should be released "at the earliest appropriate time," R.C. 3.9a.

Because the press, like any member of the public, has a qualified constitutional right to attend governmental proceedings that, like the military commissions, are judicial in nature, the media objectors have standing to be heard prior to the entry of any order closing the military commissions herein. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) ("representatives of the press and general public '*must* be given an *opportunity to be heard* on the question of their exclusion.'") (emphasis added); *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 949 (9th Cir. 1998) ("[The court] must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives [to closure]. If objections are made, a hearing on the objections must be held as soon as possible."). *See also In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d 1, 5 (D.D.C. 2009) (allowing press applicants to intervene to oppose sealing motion). Indeed, military tribunals have recognized the right of the press to be heard in support of their effort to enforce the public right of access to such proceedings. *See, e.g., ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997) ("[W]hen an accused is entitled to a public hearing, the press enjoys the same right and *has standing to complain if access is denied*.") (emphasis added); *Denver Post Corp. v. United States*, Army Misc. 20041215, at *2 (A. Ct. Crim. App. Feb. 23, 2005) (noting "obvious" "procedural error" in closing proceedings before allowing newspaper's counsel to address the issue).

The public's constitutional right of access to the records and proceedings of the commissions at Guantanamo is a qualified, not an absolute, right. But the qualified right can only be overcome where there exists a countervailing interest of "transcendent" importance that requires a restriction of the access right. *E.g., Richmond Newspapers*, 448 U.S. at 581; *Globe Newspaper*, 457 U.S. at 606-07. To justify closure or sealing, the tribunal must make *specific factual findings*, on the record, that closure or sealing "is essential to preserve higher values and is narrowly tailored to serve that interest." *E.g., Press-Enterprise II*, 478 U.S. at 13-14 (internal quotation marks omitted).[3] And, most critical for purposes of this objection, **closure of a**

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re New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (pre-trial suppression motion); *In re Washington Post Co.*, 807 F.2d 383, 389-90 (4th Cir. 1986) (plea and sentencing materials); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (all pretrial court filings).

[3] The adjudicatory tribunals of the military branches have applied this same standard. As explained in *Hershey*, "the party seeking closure must advance an overriding interest that is likely to be prejudiced [by openness]; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review." 20 M.J. at 436; *see also Anderson*, 46 M.J. at 729 ("[T]he military judge placed no justification on the record for her actions. Consequently, she abused her discretion in closing the court-martial.").

military commission proceeding can only be ordered, consistent with the Constitution of the United States, upon an express finding that no "less restrictive means" is available to adequately protect the governmental interest at stake. *See, e.g., Presley v. New Georgia*, __ U.S. __, 130 S. Ct. 721, 724 (2010) (holding "that trial courts are required to consider alternatives to closure even when they are not offered by the parties"); *see also U.S. v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985) (holding that trial court judge "must consider reasonable alternatives to closure; and . . . make adequate findings supporting the closure to aid in review").

THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT A BLANKET CLOSURE OF THE TESTIMONY OF AL NASHIRI

Mr. al Nashiri stands accused of having orchestrated Al Qaida's bombing of the U.S. naval warship, the USS Cole, off Yemen in October 2000, resulting in the death of seventeen U.S. sailors. Mr. al Nashiri is the first U.S. detainee to face capital punishment if convicted in this military commission. As your honor recognized in the January 6, 2012 Order granting the Government's Motion for Public Access to Open Proceedings via Closed-Circuit TV Transmission to Remote Locations (AE028), "due to the serious nature of the crimes alleged and the historic nature of military commissions, there is significant public interest in the Commission proceedings" in this matter.

Moreover, the circumstances of Mr. al Nashiri's interrogations at the hands of the CIA and/or others under the direction or control of the U.S. Government --which has already been the subject of significant public and press attention worldwide (see below) -- presents issues of profound public interest and concern. These and other matters to be addressed at the hearing of April 11, 2012 shed considerable light on how the United States government treats "high-value detainees" such as Mr. al Nashiri, and how such treatment affects both the fairness and the appearance of fairness of these proceedings – all issues of profound public interest to the readers and viewers of the Press Objectors.

To shield from public view altogether the entirety of Mr. Nashiri's testimony, would be contrary to the settled judicial precedents set forth above and below; furthermore, blanket closure of his testimony at the hearing would pose the risk of undermining the legitimacy and credibility of the military commissions in general: "'Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.'" *United States v. Brown*, 22 C.M.R. 41, 45 (C.M.A. 1956) (quoting Wigmore, *Evidence* § 1834 (3d ed.)), *overruled, in part, on other grounds by United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977);

The Army Court of Military Appeals has also applied this standard as the substantive prerequisite for a court to enter a "protective order" limiting public access to documents admitted into evidence in a court martial proceeding. *See Scott*, 48 M.J. at 665.

Travers, 25 M.J. at 62 ("public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public."); *United States v. Hood*, 46 M.J. 728, 731 & n.2 (A. Ct. Crim. App. 1996) ("'Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'" (quoting *Press-Enterprise I*, 464 U.S. at 508)).

A. Complete Closure of Nashiri's Testimony Does Not Satisfy Constitutional Standards Because Much of the Testimony Will Undoubtedly Address Matters That Have Previously Been Publicly Disclosed

To the extent that testimony provided in the course of the hearing on Mr. al Nashiri's motion (AE26) will discuss the "enhanced interrogation techniques" to which the United States subjected this detainee, there is no basis for closing the portion of the proceeding that addresses information already in the public domain. *See, e.g., In re Charlotte Observer*, 882 F.2d 850, 853-55 (4th Cir. 1989) (finding it "dubious" that harm to defendant's fair trial rights will result from re-publication of information already in the public domain; and, "[w]here closure is wholly inefficacious to prevent the perceived harm, that alone suffices to make it constitutionally impermissible."); *In re New York Times*, 828 F.2d 110, 116 (2d Cir. 1987) (holding that sealing of court papers is not proper where much of the information contained in them "has already been publicized"); *CBS v. U.S. Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985) (finding that a substantial probability of prejudice cannot exist when "most of the information the government seeks to keep confidential concerns matters that might easily be surmised from what is already in the public record").

This same view is mirrored in the Media Ground Rules, which expressly remove from the prohibition on press "re-publishing what otherwise would be considered Protected Information, where that information was legitimately obtained in the course of newsgathering independent of any receipt of information while at GTMO,. . ." Thus, if Protected Information has previously been the subject of publicly available press reports or prior public disclosure, the News Media Representatives are free, under the Media Ground Rules, to report such information. No compelling state interest (one of "the highest" order) can be served by barring the press from accessing information in court proceedings that it can readily obtain *outside* those proceedings.

Suffice it to say that Mr. al Nashiri's treatment as a U.S. Government detainee has already been the subject of extensive press reports worldwide. These reports include details about the types of "enhanced interrogation techniques" employed (waterboarding, blindfolding the detainee and holding an electric drill near his ear, discharging a firearm in an adjacent holding cell), the agency involved (CIA), and the locations where such techniques were utilized (e.g., Afghanistan, Thailand, Poland). Here, merely by way of illustration, is a non-exhaustive compilation of news reports and other publicly available reports that address, in significant detail, the treatment Mr. al Nashiri is alleged to have been subjected to while in U.S. custody:

NY Times

- Joanna Berendti, Polish Ex-Official Charged With Aiding C.I.A., NEW YORK TIMES (Mar. 27, 2012), http://www.nytimes.com/2012/03/28/world/europe/polish-ex-official-charged-with-aiding-cia.html?scp=1&sq=nashiri+and+poland&st=nyt
    - "In **Poland**, detainees were held in a **makeshift prison at a secret base near Szymany Airport, about 100 miles north of Warsaw**. All three of the C.I.A. prisoners who were **waterboarded** are believed to have been held in Poland, including ….Abd al-Rahim al-Nashiri, who is charged in the 2000 bombing of the American destroyer Cole;"

- New Charges Filed Against Suspect in U.S.S. Cole Bombing, NEW YORK TIMES (Apr. 20, 2011), http://www.nytimes.com/2011/04/21/us/21gitmo.html?scp=2&sq=nashiri+and+poland&st=nyt
    - "Mr. Nashiri was **captured in Dubai** in November 2002 and flown to **a C.I.A. prison in Afghanistan known as the Salt Pit** before being moved to a clandestine C.I.A. facility in **Thailand**, where he was **waterboarded twice**."

- Mark Mazzetti, C.I.A. Document Details Destruction of Tapes, NEW YORK TIMES (Apr. 15, 2010), http://www.nytimes.com/2010/04/16/us/16tapes.html
    - "**In 2002, C.I.A. operatives in Thailand videotaped the interrogations of** Abu Zubaydah and **Abd al-Rahim al-Nashiri**, two Qaeda suspects whom the C.I.A. was holding in secret in that country."

- Times Topic, Abd al-Rahim al-Nashiri, NEW YORK TIMES (Nov. 9, 2011), http://topics.nytimes.com/topics/reference/timestopics/people/n/abd_alrahim_al_nashiri/index.html
    - Goes into detail about the interrogation techniques used, including:
        - "one of three detainees subjected to the suffocation technique called waterboarding"
        - "**the C.I.A. inspector general called his the "most significant" case of a detainee who was brutalized in ways that went beyond the Bush administration's approved tactics**"
        - "the inspector general said, Mr. Nashiri's interrogators threatened him with a power drill in a mock execution"
        - "He was previously held in secret Central Intelligence Agency prisons and is one of three detainees known to have been subjected to the drowning technique known as waterboarding"
        - "Last year, Polish prosecutors investigating a now-closed C.I.A. prison granted Mr. Nashiri 'victim status.'"

- Mark Mazzetti, U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations, NEW YORK TIMES (Mar. 2, 2009), http://www.nytimes.com/2009/03/03/washington/03web-intel.html?scp=7&sq=nashiri+and+thailand&st=nyt
    - "The tapes had been held in a safe at the C.I.A. station in Thailand, the country where two detainees — Abu Zubaydah and Abd al-Rahim al-Nashiri — were interrogated"

CNN

- Tim Lister, Ten years of 'Gitmo' -- and more to come, CNN (Jan. 11, 2012), http://www.cnn.com/2012/01/11/world/analysis-gitmo-ten-years/index.html
    - "Al-Nashiri's case is emblematic of much of the controversy swirling around Guantanamo. The CIA inspector-general found in 2004 that he was water-boarded and had a power-drill revved close to his head while being interrogated in 2002 at a "black site" in Thailand, which may complicate the task of prosecuting him."

Associated Press

- Adam Goldman, Report: CIA officer implicated in abuse case back at work, ASSOCIATED PRESS (Sept. 7, 2010), http://www.msnbc.msn.com/id/39043456/ns/us_news-security/#
    - "Al-Nashiri was captured in Dubai in November 2002 and was taken to another CIA secret prison in Afghanistan known as the Salt Pit — a facility that figures in a separate Durham prosecution of a detainee death in 2002. Al-Nashiri was flown to still another secret CIA prison in Thailand, where he stayed briefly, then taken to the Poland prison on Dec. 5, 2002, just days after that facility was opened. In Poland, al-Nashiri was subjected to a series of enhanced interrogation techniques — including some not authorized by Justice Department guidelines."
    - "According to the review, Albert took an unloaded semiautomatic handgun to the cell where al-Nashiri was shackled. The officer then racked the slide — a cocking action — of the unloaded weapon once or twice next al-Nashiri's head, according to the review."
    - "The special review said that, probably on the same day, Albert revved a power drill to frighten al-Nashiri, who had been left naked and hooded"

Wall Street Journal:

- "Treatment of Suspect Is Issue in Cole Trial" (1/17/12): http://online.wsj.com/article_email/SB10001424052970204555904577167570435510912-lMyQjAxMTAyMDAwNDEwNDQyWj.html?mod=wsj_share_email
    - the shackles, by which Mr. Nashiri's legs are attached to a bolt in the floor, r**ecall his conditions when agents put a gun to his head and threatened him with a power drill**,

said Mr. Kammen, a civilian death-penalty specialist from Indianapolis. He said the shackles could trigger post-traumatic stress disorder in Mr. Nashiri.

- The **gun and power-drill incidents were detailed in a long-withheld 2004 Central Intelligence Agency report released in 2009**. The government didn't dispute Mr. Kammen's account at the hearing and didn't have immediate comment afterward."

- "Cole Suspect's Trial Tests Gitmo Rules" (11/10/11): http://online.wsj.com/article_email/SB10001424052970204224604577028240352809390-lMyQjAxMTAyMDAwNDEwNDQyWj.html?mod=wsj_share_email

  - "The Saudi-born Mr. Nashiri spent years in the secret prisons of the Central Intelligence Agency after his 2002 capture, where he **was one of three detainees the government acknowledges were waterboarded during a harsh interrogation regime defense attorneys describe as torture**. Mr. Nashiri's attorneys indicated that their strategy could focus on his treatment.

- "Gov't Seeks Death for Saudi Charged With USS Cole Bombing." (6/30/08): http://blogs.wsj.com/law/2008/06/30/govt-seeks-death-for-saudi-charged-with-uss-cole-bombing/?blog_id=14&post_id=6066

  - "Last year, at a Gitmo hearing, Nashiri confessed to helping plot the Cole bombing only because he was tortured by U.S. interrogators. **The CIA conceded that Nashiri was among terrorist suspects subjected to waterboarding in 2002 and 2003**.

- "Special Prosecutor to Probe CIA Handling of Terror Suspects" (8/25/09): http://online.wsj.com/article_email/SB125111559865553571-lMyQjAxMTIyNTAxNDEwMTQ1Wj.html?mod=wsj_share_email

  - . . . the Justice Department released a heavily redacted report from the CIA's inspector general...

  - The report describes the threat of the use of a handgun and power drill on the alleged architect of U.S.S. Cole bombing, Abd al-Rahim al-Nashiri. The debriefer took an unloaded semiautomatic handgun and simulated a bullet being chambered twice near Mr. Nashiri's head

  - That debriefer also helped stage a "mock execution," in which a gun was fired outside an interrogation room and a guard, dressed up to look like a hooded detainee, posed motionless on the ground when the real detainee passed to "appear as if he had been shot to death."

- Mr. Nashiri was also held in "potentially injurious stress positions" that hadn't been specifically authorized that could have dislocated his arms from his shoulders. Interrogators also used "a stiff brush that was intended to induce pain" on Mr. Nashiri, and they stood on his shackles, which resulted in cuts and bruises on his ankles."

The Guardian

- Guantanamo file on Al-Nashiri, THE GUARDIAN (Apr. 24, 2011), http://www.guardian.co.uk/world/guantanamo-files/US9SA-010015DP

- Peter Beaumont, Bombshell report on CIA interrogations is leaked, THE GUARDIAN (Aug. 22, 2009), http://www.guardian.co.uk/world/2009/aug/22/cia-interrogation-report-leaked
  - "The report is understood to describe mock executions where interrogators tried to get detainees to talk by firing a gun in an adjoining room to pretend another prisoner had been killed. According to leaked information from the report, Abd al-Rahim al-Nashiri was threatened with a drill and gun during his detention at one of the CIA's so-called black site prisons after his capture in 2002. He was subjected to the near-drowning technique known as waterboarding, as were two other al-Qaida leaders."

Globalsecurity.org

- Profile on Abd al-Rahim al-Nashiri, GLOBALSECURITY.ORG, http://www.globalsecurity.org/security/profiles/abd_al-rahim_al-nashiri.htm

Voice of America

- Al-Qaida Suspect Files Human Rights Case Against Poland, VOICE OF AMERICA (May 10, 2004), http://www.voanews.com/english/news/usa/Al-Qaida-Suspect-Files-Human-Rights-Case-Against-Poland-121579139.html
  - "The lawyers claim that Saudi Arabian Abd al Rahim al-Nashiri, 46, was held and tortured in a secret CIA so-called "black site" prison in an intelligence base north of Warsaw from December 2002 to June 2003."

U.S. Government documents:

- The 9-11 Commission Final Report, Chapter 5.1 (July 22, 2004): http://govinfo.library.unt.edu/911/report/911Report.pdf

- CIA Inspector General's Report (May 7, 2004), "Counter-Terrorism Detention and Interrogation Activities (September 2011 – October 2003)" (declassified): http://media.washingtonpost.com/wp-srv/nation/documents/cia_report.pdf (details the use of various enhanced interrogation techniques; including at 36):

    - psychologist/interrogators began Al-Nashiri's interrogation using EITs immediately upon his arrival. Al-Nashiri provided lead information on other terrorists during his first day of interrogation. On the twelfth day of interrogation, [redacted] psychologist/ interrogators administered two applications of the waterboard to Al-Nashiri during two separate interrogation sessions. Enhanced interrogation of Al-Nashiri continued through 4 December 2002[.]

  (at 42):

    - 28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information. After discussing this plan with [redacted] [redacted] the debriefer entered the cell where Al-Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri's head. . . On what was probably the same day, the debriefer used a power drill to frighten Al-Nashiri. With [redacted] consent, the debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded. The debriefer did not touch Al-Nashiri with the power drill

  (at 45):

    - OIG received reports that interrogation team members employed potentially injurious stress positions on Al-Nashiri. Al-Nashiri was required to kneel on the floor and lean back. On at least one occasion, an Agency officer reportedly pushed Al-Nashiri backward while he was in this stress position. On another occasion [redacted] said he had to intercede after [redacted] [redacted] expressed concern that Al-Nashiri's arms might be dislocated from his shoulders. [redacted] explained that, at the time, the interrogators were attempting to put Al-Nashiri in a standing stress position. Al-Nashiri was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt.

- Defense Report 2007 – Transcript of Combatant Status Review Tribunal Hearing
    - Al-Nashiri on his torture – claims "From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way."

- Says he was tortured up until he was brought to Guantanamo, at which point the "pressure" ceased.

Jurist:

- Caitlin Price, CIA chief confirms use of waterboarding on 3 terror detainees, JURIS (Feb. 5, 2008), http://jurist.law.pitt.edu/paperchase/2008/02/cia-chief-confirms-use-of-waterboarding.php

- Gabriel Haboubi, Guantanamo detainee says torture prompted confession to USS Cole bombing, JURIST (Mar. 30, 2007), http://jurist.law.pitt.edu/paperchase/2007/03/guantanamo-detainee-says-torture.php

In light of the vast quantity of detailed information concerning al Nashiri's interrogations and treatment while in U.S. custody, there is no factual or legal basis to justify closing any military commission hearing for testimony or arguments that address information already in the public domain.

B. An Order Closing the Entirety of al Nashiri's Testimony Cannot Satisfy the Constitutional Standards Because Less Restrictive Means Are Readily Available That Adequately Protect the Government's Interest

Nor can complete, blanket closure of the testimony of al Nashiri (and other witnesses at the April 11, 2012 hearing) pass constitutional muster, because "less restrictive means" can adequately protect the governmental interest at stake. Media Ground Rule § G(4) provides for discussion of Protected Information in open sessions to be observed by the media through a glass partition, with the audio of the proceeding transmitted to the viewing room using a 40-second delay; this procedure allows the Government to withhold any classified and/or protected information, while simultaneously permitting the press and public to observe the witness' demeanor, and that of other trial participants, and to listen to the portions of the proceeding, in nearly real time, that do *not* involve the discussion of Protected Information.

RMC 806 also supports the view that the trial judge should adopt the "least restrictive means" to protect the disclosure of "Protected Information."[4] The Discussion following that rule provides that "[a]bsent a need to close the proceedings, the military judge may take other lesser measures (such as the use of delayed broadcast technologies as a substitute for live testimony) to protect information and ensure the physical safety of individuals." Notably, too,

[4] RMC 806(b)(2)(B) provides that "The military judge may close to the public all *or a portion* of the proceedings under paragraph (A) only upon making a specific finding that such closure is necessary to—(i) protect information the disclosure of which could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods, or activities . . ." (emphasis added).

the Discussion following that rule cites with approval *United States v. Grunden*, 2 M.J. 116, 120 (C.M.A. 1977). In *Grunden*, the Court of Military Appeals reversed the closure of a court martial to protect against disclosure of classified information as overbroad: "In excising the public from the trial, the trial judge employed an ax in place of the constitutionally required scalpel."

> even assuming a valid underlying basis for the exclusion of the public, **it is error of 'constitutional magnitude' to exclude the public from all of a given witness' testimony when only a portion is devoted to classified material**. The remaining portion of his testimony will be presented to the court member in closed session. This bifurcated presentation of a given witness' testimony is the most satisfactory resolution of the competing needs for secrecy by the government, and [the need for a public proceeding] by the accused.

Grunden, 2 M.J. at 123 (footnotes omitted) (emphasis added).

Moreover the existing practice of allowing the press to *visually observe* the proceedings and to listen to a 40-second time delayed audio transmission, either in ELC2 or at the remote viewing site at Fort Meade, Maryland, is far preferable and a "less restrictive means" of advancing the government's interest (protecting national security) than a complete denial of access – aural *and visual* -- to the testimony of Mr. al Narishi. Even if the tribunal considers the vast bulk (or entirety) of the testimony to be classified, and thus drowns out the audio portion by "white noise," the press could still report on the witness' demeanor and that of the other trial participants. Upon release of the redacted transcripts, too, the press could determine how much of the audio portion of the hearing – as a percentage of the hearing – was withheld on the ground of "protected information."

In addition to the above protections for nondisclosure of protected information, the Media Ground Rules -- which require a signature indicating agreement to abide by the Rules by each News Media Representative attending the military commissions on Guantanamo Bay -- prohibit these media representatives from "publish[ing], releas[ing], publicly discuss[ing], or shar[ing] information gathered at GTMO . . . that is protected information for purposes of these Ground Rules." *See* Ground Rules § C(2). Furthermore, the Ground Rules provide that "if protected information is inadvertently disclosed during a session, NMRs are urged to respect any temporary media embargo issued by the military judge until any disputes about the status of the information are resolved." *Id.* § F(4). Quite plainly, all of the above measures, in isolation and particularly, in combination, constitute "less restrictive means" to protect the Government's asserted interests; the availability of such effective but less restrictive alternatives render a blanket closure of the entirety of al Nashiri's testimony overbroad, i.e. not sufficiently "narrowly tailored" to pass constitutional muster.

Lastly, the Press Objectors further request that in addition to conducting al Nashiri's testimony as an "open session[] with delay," pursuant to Media Ground Rules § G(4), the military commission should also make available (within the same news cycle) an unclassified transcript of the hearing, in which classified and/or protected information is redacted. Such transcripts were provided of proceedings before the Combatant Status Review tribunals in 2007. *See also Denver Post Corp. v. United States*, Army Misc. 20041215 (Army Ct. Crim. App. Feb. 23, 2005) (ordering the release of a redacted transcript of an article 32 hearing that had been improperly closed to the public); *United States v. Moussaoui*, 65 F. App'x 881, 891, 2003 WL 21076836 *6, 31 Media L. Rep. 1705 (4th Cir. May 13, 2003) (ordering court reporter to produce a written transcript of the sealed proceedings within 24 hours, which shall be submitted to the Government to "proceed immediately with a classification review and redaction of the transcript").

CONCLUSION

As indicated above, the April 11th hearing on Mr. al Nashiri's motion will address issues of unquestionably legitimate public interest to citizens of the Unites States, and the international community. Because much of Mr. al Nashiri's testimony will address matters and information that has previously been publicly disclosed and the subject of widespread press reports, there is no basis in law to justify the closure of the portion of the proceedings where such publicly available information is discussed. Moreover, because more narrowly-tailored "less restrictive means" of protecting previously undisclosed "protected information" are readily available, the Press Objectors hereby respectfully request that the Court employ the means that have proven successful (see Media Ground Rules § G(4)) in past military commission proceedings. Failure to adopt and employ such readily available less restrictive means would not only violate the Constitution of the United States, it could undermine the credibility of, and public trust in, the proceedings of this military commission.

Respectfully submitted,

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